IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 17TH JULY 2007 / 26TH ASHADHA 1929

WP(C).No. 13313 of 2006(I)

OS.201/1982 of MUNSIFF COURT,CHAVAKKAD

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PETITIONERS:

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1. LEELAVATHY AMMA, D/O.CHEERAKUZHY MEENAKSHIAMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

2. SASIKUMARAN, S/O.CHEERAKUZHY KUNJULAKSHMY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

3. MAYADEVI, D/O.LEELAVATHY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

4. PRASANNAKUMARI, D/O.LEELAVATHY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

5. LAKSHMI BHAI, D/O.LEELAVATHY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

6. MANIKANDAN, S/O.LEELAVATHY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

BY ADV. SRI.RAJIT
SRI.RANJIT BABU

RESPONDENTS:

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1. SETHUMADHAVAN, S/O.CHEERAKUZHY KUNJULAKSHMY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

2. RADHAMMA, D/O.CHEERAKUZHY KUNJULAKSHMY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

3. SANTHAKUMARI AMMA, D/O.CHEERAKUZHY KUNJULAKSHMY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

4. ACHUTHANANDAN, S/O.CHEERAKUZHY KUNJULAKSHMY AMMA, IRINGAPRAM AMSOM, THIRUVENKIDOM DESOM, CHAVAKKAD TALUK.

R1 BY ADV. SRI.P.VIJAYA BHANU
SRI.P.SANTHOSH (PODUVAL)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX(WPC 13313/06)

PETITIONERS' EXTS.:

EXT.P1: TRUE COPY OF THE ORDER DT. 7.2.2003 IN CRP 575/02 OF THIS HON'BLE COURT.

EXT.P2: TRUE COPY OF THE SKETCH SUBMITTED BY THE COMMISSIONER.

EXT.P3: TRUE COPY OF THE ORDER OF THE MUNSIFF COURT, CHAVAKKAD DT. 23.11.2005 IN EP 15/00 IN O.S.201/82.

PIUS C. KURIAKOSE,J.

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W.P.(C) No.13313 of 2006

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Dated: 17th July, 2007

JUDGMENT

Under challenge in this Writ Petition filed by the judgment-debtors 1, 3,5,6,7 and 8 in O.S.No.201/82 on the files of the Chavakkad Munsiff Court is Ext.P3 order dated 23.11.2005 passed by that court in E.P.No.15/00 filed by respondents 1 and 2, the two decree-holders. O.S.No.201/82 was filed by the plaintiffs for a declaration of rights for using plaint B Schedule pathway claiming easement right. The suit was dismissed by the trial court. But the lower appellate court allowed the appeal and granted a right of way to the plaintiffs having a width of 9 to 10 feet. This court in S.A.No.1006/89 confirmed the right of easement in favour of the plaintiffs. This court held that width of the way shall be only 9 feet. It was to execute that decree that E.P.No.15/2000 was filed by the decree-holders. On the execution side a Commission was taken and the Advocate Commissioner reported the existence of a drain having a width of more than one foot. The decree-holders on the execution side sought for a 10 feet width way claiming that the drain had to be excluded while calculating the width of 9 feet. The above contention of the decree-holders was accepted by the execution court. Against

the order of the execution court, the judgment-debtors filed C.R.P.No.575/02 before this court. This court set aside the order of the execution court passing Ext.P1 judgment and remanded the matter back to the execution court holding that the width of the drain cannot be excluded while calculating the decreed width of 9 feet. Ext.P3 is the order passed pursuant to Ext.P1 order and the petitioners complain that Ext.P3 has been passed in total disregard of Ext.P1 order.

2. Under Ext.P3 order allowing the execution petition, the execution court has deputed the Amin to restore the way shown by the Advocate Commissioner in the plan marked as Ext.C5. The Amin was specifically directed to get the mud put in the area having a width of 9 feet starting from the western boundary of the drainage shown by the Commissioner in Ext.C2 plan removed and he was also directed to get the plants situated within that area shown by the Commissioner in Ext.C2 plan dated 10.4.2001 removed.

3. Heard Mr.Rajit, learned counsel for the petitioners and Mr.P.Vijaya Bhanu, learned counsel for the respondents extensively.

4. Assailing Ext.P3 Mr.Rajit submitted that there has been absolutely no application of mind by the execution court while

passing Ext.P3. The direction given to the Amin to get the mud put in the area having a width of 9 feet starting from the western boundary of the drainage shown by the Commissioner in Ext.C2 plan removed is in total disregard of the directions of this court in Ext.P1 order. Counsel submitted that the appellate and the second appellate decrees have not been construed by the execution court through correct perspectives. During trial stage the Advocate Commissioner had reported freshly put mud over the pathway which was shown as the blue shaded portion. Neither in the appellate decree nor in the second appellate decree was a reference to the drainage of water flowing through the pathway. The decree as modified by the second appellate decree by the second appellate court clarifies the width of the pathway to be just 9 feet and that the pathway shall end in the blue shaded portion or the portion to the east. This court under Ext.P1 elaborately construed the decree passed by the appellate and the second appellate court and held that there was no drain flowing through the disputed pathway at the time when the Commissioner had initially visited the property during trial side and therefore there was no question of excluding the drain while measuring the 9 feet pathway. Ext.P3 order does not refer to

these aspects at all. The courts below ought to have seen the existence of a drainage having a width of more than one feet was not noted in Ext.C2 sketch in the suit. The only landmark noted in Ext.C2 was the compound wall and the plaint B schedule way. The direction of the execution court to restore 9 feet pathway starting from western extremity of the drainage is therefore clearly illegal. Learned counsel submitted that the Commissioner found it is impossible for identifying the blue shaded portion and red shaded portion. This identification is very material for properly construing the decree. Counsel submitted that the petitioners are willing to grant a 9 feet pathway taken from the eastern extremity (from the compound wall). The insistence getting pathway having a width of 9.5 -10 feet by the decree-holders is not acceptable to the petitioner since the same is against the decree and the judgment of this court in Ext.P1 order. Ext.P3 amounts to repetition of the earlier order which was actually set aside by Ext.P1. My attention was drawn by Mr.Rajit to various documents, particularly, Ext.P1 order and the plants submitted by the Advocate Commissioner.

5. Even though the submissions were resisted by the learned counsel for the respondents, I am inclined to accept the submissions

of Mr.Rajit. The ultimate directions issued by the execution court will have to be set aside since they run contrary to Ext.P1 order of this court and the decree which was under execution.

6. The result is that the impugned order is set aside to the extent the same directs that the Amin shall get the mud put in the area which is having a width of 9 feet starting from the western boundary of the drainage shown by the Commissioner in Ext.C2 plan removed. The above direction is deleted. However, it will be ensured that the respondents-decree-holders gets a pathway having a width of 9 feet without reckoning the width of the drainage.

The Writ Petition is allowed to the above extent. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**